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# In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
*Respondent,*

vs.

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,
*Petitioners.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## OPINIONS BELOW

1. On October 12, 1977, Senior District Judge Abraham Lincoln Marovitz Ordered that Fines be paid and additional Restitution be paid from the one million dollars plus interest in Fund B, contrary to the terms of the Revised Settlement Agreement which established Fund B.

2. On January 24, 1979, the Seventh Circuit Court of Appeals affirmed Judge Marovitz' Findings, Conclusions, and Order for Restitution and Fines from Fund B.

3. Appellants petitioned timely for a Rehearing En Banc, which was denied on March 1, 1979.

## JURISDICTION

1. The United States Supreme Court has jurisdiction under United States Supreme Court Rule 21 and related federal statutory and Constitutional provisions. The Writ of Certiorari should be granted, because constitutional issues are involved, i.e. provisions against excessive fines, and in favor of the right to enter into and reply upon contracts; and because the Court of Appeals has ruled contrary to the decisions on Restitution rendered in other circuits and in their own circuit.

## QUESTIONS PRESENTED

I. Under Title 18 U.S.C. section 3651, what are the meanings of "aggrieved parties" and of "as complete restitution as possible?

Can 3,197 civil class-action members be paid restitution if they are not included in those persons named as victims in the various Counts of the Indictment?

Can 3,197 civil class members be paid additional restitution contrary to the terms of the civil Settlement Agreement?

Can a District Court Judge in a criminal case Order another District Court Judge in a related civil case to pay restitution contrary to the terms of the civil Settlement Agreement?

Can the contractual provisions of a Settlement Agreement in the civil case be abrogated and ignored in order to pay excessive restitution from a related criminal case where the defendants entered *nolo contendere* pleas to the mail fraud counts, and all but a few of the class members were not included in the Indictment?



II. What is the difference between a *nolo contendere* plea and a guilty plea? If a *nolo* plea is used as an admission in a civil case based upon the same facts as the criminal case, and contrary to the terms of the Settlement Agreement, is the defendant deprived of property without due process, contrary to Amendment V of the U.S. Constitution, by being deprived of his right to enter into Contracts, including the Settlement?

III. Does the use of Fund B ($1,000,000) as additional restitution, contrary to the provisions of the civil Settlement Agreement, constitute Excessive Fines, thereby violating Amendment VIII of the Constitution?

## STATEMENT OF THE CASE

The petitioners are the individual defendant-appellant, Rawlin L. Stovall, and his corporation, American Cash Commodities of Missouri, Inc.

Cash Commodities is a term defining contractual transactions whereby two persons contract that one will buy from the other a certain quantity of a commodity, such as grain, silver, etc., for delivery to the other at a specified future date, at a price agreed to at the time of making the agreement. If it is the intent of the parties, at the time of making such contract, to actually make and take delivery at the deferred delivery date agreed upon in the contract, it is not a "futures" transaction required to be traded on a board of trade. For example, Contract Law permits a farmer to contract to sell a specific number of bushels of corn to Stovall, who agrees to accept the agreed-upon quantity and price on the delivery date, and to direct the farmer to deliver it to a warehouse to be specified at the time of delivery.

Contract Law principles also permit the parties to agree to modify the contract, so that there is nothing to prevent the buyer and seller from agreeing, between the time of the contract and the delivery date, to terminate the contract without delivery but with one paying the other a nominal amount depending upon prevailing prices at the time of termination. Such transactions between two parties are Cash Commodities for Deferred Delivery as contrasted to Futures Contracts traded on the Board of Trade.

American Cash Commodities of Missouri, Incorporated and Rawlin L. Stovall entered into Purchase and Sale Agreements in about 1972, with some 3,000 individuals, whereby it was agreed that said individuals would buy and sell commodities for deferred delivery, from and to Stovall, on individual contracts to be entered into from time to time. It was agreed that these were to be arms-length transactions, and it was also agreed that both sides intended to make or take delivery of the commodity. It was further agreed that each individual trader would deposit earnest money with American Cash, and such deposits averaged about $2-3,000 per person. Said Depositors also contracted that these deposits were to remain on deposit for a minimum of 24 months. None of the deposits had been held for the 24-month period prior to the Indictments of Stovall and American Cash; so that no one would ever have been able to show that Stovall had not intended to return their deposits according to the contract.

The simplest and most startling fact in this litigation is that, at all times, Stovall and American Cash had the total deposits—about eight million dollars ($8,000,000.00) on deposit in safety deposit boxes in the Continental National Bank of Chicago. Then the money was frozen, pending further Orders of the Courts, and the Depositors have already received refunds of some $6,500,000; and the attorneys have received close to one million dollars, even



though there never has been any trial, either in the criminal or the civil cases. If Stovall had had some criminal intent, the millions would not have been accessible and intact.

A highly important fact, which is so simple that it tends to be overlooked, is that there would have been no purpose to setting up two Funds if both were to be used for the same purpose, namely restitution to the class members. The million dollars constituting Fund B was established for other specific purposes, none of which is stated to be for restitution except to the handful of opt-outs. After all obligations mentioned under Fund B have been met, the balance was specifically to be paid to the defendant, American Cash Commodities of Missouri, Inc. It was for that reason, and that reason alone, that the defendants had an incentive to enter into a Settlement Agreement rather than going to trial. The Settlement Agreement specifically says, in so many words, that the defendants admitted no wrongdoing whatsoever, and were settling only because they were satisfied with the terms of the settlement, considering the vagaries of the outcome of any protracted litigation. There is no way the defendants could have fared worse in the civil action than they will now if Judge Marovitz is to be allowed to give an unexpected, unrequested windfall to the class members, in complete contradiction of the terms of the civil settlement.

The written notice sent after August 16, 1974, to all depositors concerning the settlement and the opt-out rights for Fund B clearly stated the terms of Fund B as follows:

> "The approximate sum of $1,000,000 (Fund "B") will be set aside in interest-bearing accounts and subject to claims of any creditors who are not depositors, the claims of depositors who choose to litigate their claims, claims of the Internal Revenue Service, and of any creditors who are not depositors, defendants' attorneys' fees and costs and any fines imposed against

defendants in the criminal proceedings before Judge Abraham L. Marovitz. In the event any funds remain in Fund "B" after payment of all claims herein described, the balance shall be turned over to AMERICAN."

Fund B would cover those depositors who chose to opt-out of Fund A and pursue fully their claims against the Defendants. At the time the claim and opt-out notices were sent to the depositors in August, 1974, no one knew if the opt-outs would equal or exceed $1,000,000. If they did, then no balance of Fund B would enure to the benefit of the Defendants. With the hindsight that we now have, we know that depositors with claims of less than $60,000 chose to be included in Fund B. More than 99½% of the depositors chose to satisfy their claims from Fund A and execute releases barring any further rights against the Defendants.

Neither by the settlement terms of Fund B nor by any other provision does Judge Marovitz or Judge McMillen have any right under the settlement agreement to award sums in Fund B to depositors outside the class of opt-outs.

The relevant provisions of the Revised Settlement Agreement (Appendix 4, App. pp. 19-22) state as follows:

"1. The general purpose of this agreement is to effect a full and final settlement and release of all consolidated claims against the undersigned defendants, brought by or on behalf of all plaintiffs and arising out of, mentioned in, related to, or based in whole or in part on any of the facts or matters alleged in the actions as heretofore filed, or which may hereafter arise between all named plaintiffs, and defendants. . . .

"2. The undersigned defendants state that by this agreement they do not admit that they . . . committed or participated in any violations of any laws, or that



they . . . are liable to the plaintiffs, or anyone, for damages relating to the investments in cash commodities for deferred delivery. . . .

"3(a). . . . (T)here now exists the following funds . . . in the approximate amount of $7,800,000.00. . . .

" 'Settlement Fund A' shall be in the approximate sum of $6,500,000.00. . . .

"3(b). . . . 'Settlement Fund A' shall be available to all plaintiff-depositors who shall participate in this settlement. . . .

"3(c). 'Settlement Fund B' shall initially consist of $1,000,000.00 plus whatever sums 'pour over' . . . (and) shall be held subject to the disposition of such litigation as may ensue on behalf of 'opt-out' claimants or others, including defendants' attorney fees and costs. It shall also be subject to claims of the Internal Revenue Service. After payment or denial by court order of all of those claims . . . all funds remaining, if any, shall belong to 'American'. . . ."

## REASONS FOR GRANTING WRIT OF CERTIORARI

### I.

**UNDER SECTION 3651 OF TITLE 18, U. S. CODE, THE MEANINGS OF "AGGRIEVED PARTIES" AND OF "AS COMPLETE RESTITUTION AS POSSIBLE" HAVE BEEN DEFINED AND CLARIFIED BY THE COURTS.**

**CIVIL CLASS ACTION MEMBERS EXCEEDING SOME 3,000 PEOPLE CANNOT BE PAID RESTITUTION IF THEY WERE NOT INCLUDED IN THOSE PERSONS NAMED AS VICTIMS IN THE VARIOUS COUNTS OF THE INDICTMENT; NOR CAN THEY BE PAID ADDITIONAL RESTITUTION, MORE THAN THE MILLIONS OF DOLLARS ALREADY PAID FROM FUND A, IF IT IS CONTRARY TO THE TERMS OF THE CIVIL SETTLEMENT LIMITING RESTITUTION TO FUND A; BECAUSE THERE IS NO SUCH THING AS A CRIMINAL CLASS ACTION.**

**ONE DISTRICT COURT JUDGE IN A CRIMINAL CASE CANNOT ORDER ANOTHER DISTRICT COURT JUDGE IN A RELATED CIVIL CASE TO PAY RESTITUTION WHETHER OR NOT IT IS CONTRARY TO THE TERMS OF THE CIVIL SETTLEMENT AGREEMENT.**

**THE RELEASES, SIGNED BY THE PLAINTIFFS IN THE RELATED CLASS ACTION SUIT, CONSTITUTE A BAR TO THE IMPOSITION OF ADDITIONAL RESTITUTION IN THE CRIMINAL CASE.**

**Civil Class Action members exceeding 3,000 people cannot be Paid Restitution if they were not included in those Persons Named as Victims in the various Counts of the Indictment; nor can they be Paid Additional Restitution, more than the Millions of Dollars already Received from Fund A, Contrary to the Terms of the Civil Settlement Limiting Restitution to Fund A; because there is No Such Thing as a Criminal Class Action.**

The judge in the criminal case is not empowered to order restitution to all of the 3,197 victims of defendants' fraud,



but is instead empowered to order restitution only to the individuals named in relation to the mailings described in counts 7, 8, 10, 19 and 21 of the indictment. In each of those counts the item alleged to have been mailed was an envelope containing a check. These checks totaled $50,387.40. In other words, the only restitution which is appropriate in this case, other than the millions paid with releases under the Revised Settlement Agreement from Fund A, is a return of the money actually sent through the mail, by the named aggrieved individuals. The restitution already paid from Fund A would have comprised nearly 100% of their original investments, if the Court considers the payment of $600,000 or more to their attorneys. Any other construction would make the Revised Settlement Agreement meaningless, whereas the law of contracts applies to settlements.

The "List of Victims" submitted by the government contains claims submitted by the 3,197 totalling $8,750,225.88. The victims have received at least $6,919,557.92 in settlement of the civil suit and may receive approximately $100,000 more upon distribution of the amount finally remaining in Fund A.

One of the key cases interpreting "aggrieved party or parties" and "actual damages or loss caused by the offense for which conviction was had," 18 U.S.C.A. 3651 and its predecessor Section 724, is *United States* v. *Follette*, 32 F.Supp. 953. In that case Judge Maris made the same kind of error that Judge Marovitz had done in the instant case, by including in the term "actual damages or loss caused by the offense for which conviction was had" an amount greater than the amounts in the counts of the indictment. Even though in that case it was only the difference between $466.28 and $203.99, as contrasted in the instant case to $1,000,000 plus interest versus about

$50,000, "the condition of restitution was required to be modified so as to relate to the embezzlement of $203.99 only." Also, in that case, there was a plea of guilty rather than *nolo contendere.* In that case, the Judge, in reconsidering and amending his original sentence, reasoned "it will be seen from the last paragraph of Section 1 of the Act . . . that when restitution is made a condition of probation it may only be ordered to be made to an 'aggrieved party' and 'for actual damages or loss caused by the offense for which conviction was had.'"

In the *Unger* case, the Court stated the necessity of naming in the indictment, the specific individuals who are the aggrieved parties entitled to restitution:

> "By specifically describing the mailing, gist of the offense, the Defendant is protected from being placed *in jeopardy a second time for the same offense. . . .* It was possible to name in the indictment certain (individuals)," *United States* v. *Unger,* 295 F.2d 889, 891 (emphasis added). "There the indictment showed that the scheme of defendant was to defraud definite individuals. . . . It was held, therefore, that they should have been described by name in the indictment or a good reason given for the omission," *Unger, Ibid.,* 892.

In the instant case, the Government never gave any reason at all for not setting forth more of the addresses and therefore is now barred forever from claiming them as aggrieved parties in any capacity whatsoever, other than those specifically described as victims in the indictment for which conviction was had under Title 18 U.S.C. 3651.

Not only did the Government attorneys know of the terms of the Civil Settlement, but they acted as an opposite party in the negotiations for the civil cases. The U.S. Attorney's Office, although being the only proper attorneys in the criminal case, allowed, condoned and encouraged the attorneys from the civil case to participate in the proceedings of the criminal case. Undoubtedly, the U.S. Attorney had this in mind when he advised Judge Marovitz that his office was opposed to a *nolo contendere* plea, knowing full well that such a plea is designed to prevent exactly what has happened in all this litigation, namely that the *nolo* plea in the criminal case *has been used exactly for an admission* in the civil case. Simple logice dictates that if there were no difference between a guilty plea and a *nolo* plea, there would be no such thing as the two pleas. Only after the Government had fully agreed to the civil cases' settlement did the Plaintiffs' lawyers ratify the deal (July 26, 1974 Revised Settlement Agreement); and *no deal would have been acceptable to Stovall, whatsoever,* unless the Government had fully accepted the deal and Judge Marovitz had also agreed to it.

In *United States* v. *Buechler,* 557 F.2d 1002, the Court sets forth at page 1007, "It is plain on the face of the record that the sentence imposed was, in and of itself, *illegal.* Because the amount exceeds the *'loss caused by the offense for which the conviction was had'* the restitution order exceeded the authority conferred by Sec. 3651 and is, to that extent, illegal." (Emphasis added)

And in still another case of abuse by the trial court of its power and authority, *U. S.* v. *Clovis Liquor,* 540 F.2d 1389, the aggrieved parties were not listed in the indictment. The Government said "The parties aggrieved were not named in the indictment," and the Court of Appeals "reversed the trial court's sentencing on" the restitution and "we remand this case to the trial court . . . in reconsidering *solely* the *fines,* with no restitution at all to anyone, whomsoever." We believe that is a very fitting in-

terpretation for the instant case. Also, due to the fact that there has been no proof of fraud, either by the *nolo* plea or by the Civil Settlement; and the traders had had opportunities, time and again, for great profit, some as much as 500 per cent, for a total of seventy million dollars, yet they failed to take their earned profits. To allow further restitution, contrary to the express terms of the Civil Settlement by using Fund B for a purpose for which it was never established, negates the entire Civil Settlement, and it violates Stovall's right to enter into and reply upon contract provisions.

Court's Orders of Probation must be clear, certain, unequivocal, definitely stating the amount to be paid in the Probation Order, timely made, as stated in *Hoffman*:

> "The parties aggrieved must be *certain* and the *amount of restitution definite* of computation . . . . The judge's order is certainly *confusing* and certainly does not *set forth an account of Defendant's total . . . liability with precision and clarity.* We are thus unable to ascertain from the record before us *the amount . . . actually owed by the Defendant* . . . . The Court further found that the amounts to which the District Judge was limited were the *basic amounts stated in the Indictment any amount in excess of this sum may not, as a condition of probation, be directed to be paid during the probationary period.*" *Hoffman* 415 F.2d 14, 22 (7th Cir.) [emphasis added].

The findings of Judge Marovitz should not be allowed to stand but should be overruled, reversed and vacated, and found illegal, as in *Buechler, Clovis Retail Liquor, Hoffman, Karrell* and *Follette.* The sentencing was definitely improper and unlawful because of Judge Marovitz' having known of, and had a part in, the Civil Settlement and then deliberately failing to inquire into or make a part of the record the promises regarding the Civil Settlement and



Fund B, which had been the principal inducement to cause the change from not guilty to *nolo contendere.* The record shows that Judge Marovitz both attended hearings in Judge McMillan's court room and was invited to sit beside Judge McMillan; and he phoned Judge McMillan and otherwise tried to influence him in the litigation, even though the *nolo* plea legally prevents any such contact between judges, as do the rules of procedure of Federal Court.

The principal issue here is what is meant when everyone agrees that the Court in the Criminal Case intended to impose "as complete restitution as possible." Obviously, the specific words of Section 3651, the Restitution Statute, and the case law interpreting them are the only criteria for measuring how much is as complete restitution as possible.

**One District Court Judge in a Criminal Case Cannot Order another District Court Judge in a Related Civil Case to Pay Restitution whether or not It Is Contrary to the Terms of the Civil Settlement Agreement. The Contractual Provisions of the Settlement Agreement in the Civil Case would be Abrogated and Ignored by Such Rulings.**

Another indication that Judge Marovitz is without legal justification for nullifying terms of the settlement agreement by ordering restitution after the Plaintiff's class members had signed releases is indicated in the case law stating:

> Compromise agreements, however, regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequence thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time, . . . *In-Sink-erator Mfg. Co.* v. *Waste King Corp.*, 346 F.2d 248 (7th Circ.).

The Courts below denied the Defendants due process of law by refusing to hear objections to the amount of restitu-

tion ordered. Although Motions to correct the sentence imposed in an illegal manner must be made within 120 days of sentencing, a sentence which itself is illegal because it violates the provisions of 18 U.S.C. Sec. 3651 can be considered for the first time on appeal.

> "The probation statute, 18 U.S.C. Sec. 3651, provides that among the conditions of probation, the defendant may 'be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.' . . .
>
> "Following the Follette case, the loss caused by the offense for which Buechler was convicted was $262.12 —the amount stated in the one-count information to which she pleaded guilty. Yet without even giving her an opportunity to speak, the court below ordered her, on the basis of pre-sentence reports that are not even part of the record, to restore $1,989.35 to the bank. Because that amount exceeds the 'loss caused by the offense for which conviction was had,' the restitution order exceeded the authority conferred by Section 3651 and is, to that extent, illegal.
>
> "For the foregoing reasons, the sentence will be vacated and the case remanded for re-sentencing in conformity with this opinion."
>
> *United States* v. *Buechler,* 557 F.2d 1002 (July 1977).

In the case of *United States* v. *Landay,* 513 F.2d 306 (5th Cir. 1975), Landay was indicted for six counts of causing interstate transportation of forged securities.

> "In the meantime, the defrauded bank obtained a civil consent judgment against him, apparently in an amount greater than that covered by the three counts on which he was convicted. As a condition of probation, Landay was ordered to make restitution of the full amount of the consent judgment (by means of an elaborate security agreement). The Fifth Circuit upheld the restitution order, despite the fact that it apparently exceeded the amount involved in the offenses for which Landay was convicted. The court emphasized Landay's formal agreement, embodied in the consent judgment, as the precise amount of loss caused by his crimes. The *Landay* court did not comment, though, on the source of the trial court's power to impose a restitution order exceeding the amounts involved in the conviction counts. Judge Maris' view of the limiting language of Sec. 36(51), expressed in *Follette,* appears opposed to the Fifth Circuit's assumption that such power exists." *Ibid.*, p. 1008, footnote 10.



The Fifth Circuit enunciated new supplementary practices for taking pleas of guilty and *nolo contendere,* in the case of *Bryan* v. *United States,* 492 F.2d 775 (1974):

> "The court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. Specific inquiry shall be made as to the existence of such an agreement before the plea is accepted."

Although this procedure became effective in 1974, and the plea entered by defendant in the instant case of *nolo contendere,* was entered prior to 1974, the imposition in October 1977 of a condition of probation that the defendants must pay restitution of more than a million dollars in addition to the restitution of millions of dollars already paid as a part of the settlement agreement in the civil case, is another good reason why these defendants were denied equal protection of Section 3651 by being subjected to a delay of years between the entry of the plea, and the imposition of restitution.

> "No guilty plea which has been induced by an unkept plea bargain can be permitted to stand. . . . . No per se rule can be applied, for in the final analysis, the issue becomes one of fact. Its resolution necessarily depends upon what is alleged and what is shown by the documentation of each case." *Bryan* v. *United States,* 492 F.2d 775 (1974), p. 778.

Another case which is on all fours with the instant case is *Karrell* v. *United States,* 181 F.2d 981. The issue there, as here, is whether restitution as a condition of probation can include restitution to more individuals, or to more aggrieved parties, than those named in the specific counts of the indictment on which the defendant was convicted. In that case, Barbara Karrell was convicted by the court and jury of only six out of the seventeen counts of the indictment.

> "Our interpretation of Section 36(51) is that Congress intended to restrict the scope of the restitution which could be ordered to the limitation contained in the specific provision above quoted. It is a familiar rule of statutory interpretation that a specific provision will govern even though general provisions, if standing alone, would include the same subject. . . . We are in agreement with the reasoning in the Follette case and therefore hold that the Trial Court erred in ordering restitution as to losses sustained by any veteran other than one directly concerned in the six counts upon which Appellant stands convicted."

Petitioners herein request a similar ruling from the U.S. Supreme Court, namely that the restitution be limited to the individuals named in the counts of the indictment, rather than unnamed persons totalling more than three thousand individuals. In the alternative, we ask for an Opinion, pursuant to the *Landay* rule as interpreted in



*Buechler,* determining that the amount agreed to in the civil settlement was the exact amount of the actual damages and loss.

**The Releases, Signed by the Plaintiffs in the Related Class Action Suit, Constitute a Bar to the Imposition of Additional Restitution in the Criminal Case.**

If the civil case had been tried, the actual damages of the class members would have been determined by the Court or jury. The damages might have been their full investment, or it might have been zero if the defendants had prevailed, depending upon the open positions traded.

A class action settlement made pursuant to Rule 23 in which claimants executed releases from further damages from Defendants sets and satisfies the "damages" and thereby renders the claimants no longer "aggrieved parties" as those terms are used in the restitution provisions of 18 U.S.C. Section 3651.

Under 18 U.S.C. Section 3651 any ambiguity in a sentence or restitution order is to be resolved in favor of the criminal defendant, *U.S.* v. *Landay,* 513 F.2d 306, 308 (CA-5, 1975); *U.S.* v. *Martin,* 467 F.2d 1366 (CA-7, 1972); *Gaddis* v. *U.S.,* 280 F.2d 334 (CA-6, 1960). When the Defendants changed their pleas it was based on the proposed settlement of the civil case.

To use Fund B as Judge Marovitz proposes would destroy the legal effect of a full general release, executed by each of the class members before they had received money from Fund A. It interferes with the defendants' constitutional right to enter into a contract of settlement under the due process clause of the 5th Amendment to the Constitution. It deprives defendants of the equal protection of settlement agreements made under Rule 23, F.R.C.P.

## II.

**THE DIFFERENCE BETWEEN A NOLO CONTENDERE PLEA AND A GUILTY PLEA IS THAT THE GUILTY PLEA CAN BE USED AS AN ADMISSION IN A RELATED CIVIL CASE BASED UPON THE SAME FACTS; BUT A NOLO PLEA CANNOT BE USED AS AN ADMISSION.**

Judge Marovitz was aware at all stages of the proceedings, of the existence of the Civil Settlement Agreement; and he knew that the setting aside of $1,000,000 (one million dollars) in "Fund B" was a primary consideration in the plea negotiations leading to the *nolo contendere* pleas. Plaintiffs' lawyers, the U.S. Attorney's office, and the attorneys for the Defendants were all in on the negotiations of the Civil Settlement, and even the attorneys for the civil Plaintiffs attended hearings in the Criminal Case, without any legal justification or explanation, thereby keeping the Judge in the Criminal Case aware of the existence of "Fund B," as well as his being kept aware throughout the proceedings, for several years, of the restitution being made to the Class as a whole, and their releases as satisfaction in full, in such Civil Settlement. Judge Marovitz even knew about, and commented upon, provisions of the Civil Settlement allowing for a Class member to opt out if he were not completely satisfied with the amount of restitution being disbursed under Fund A, and for such an opt-out to be reimbursed from Fund B.

The minority opinion in *Bryan,* concurring in part, states, quoting from the A.B.A. standards relating to pleas of guilty (1968): "Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him." In the instant case, however, the trial judge failed and neglected to inquire as to whether any promises had been made.



> "Despite an ever-increasing body of criticism attacking the sentencing process, the process continues to depend almost entirely upon 'discretion' of the sentencing judge. This discretion is not, and has never been absolute, and while the appellate courts have little if any power to review substantially the length of sentences, . . . it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determined."
>
> *United States* v. *Espinoza,* 481 F.2d 553, 558.

It is stated in *Walters* v. *Harris,* 460 F.2d 988: "An unkept bargain which has induced a guilty plea is grounds for relief. *Santobello* v. *New York,* 404 U.S. 257."

As stated in *United States* v. *Mancuso,* 444 F.2d 691,

> "The Government admits the sentence as pronounced is vague. While Appellant may be required to make restitution to aggrieved parties for actual damages or loss caused by the offense which Appellants are found to have committed . . . the requirement must be clear and unequivocal. The better practice is that where parties are aggrieved, the amounts to be paid and the manner of payment should be recited in the Order. . . . For this reason the case is remanded for re-sentencing, but it is affirmed in all other respects." (p. 695)

Neither by the settlement terms of Fund B nor by any other provisions does Judge Marovitz have any authority to award sums from Fund B to depositors outside the class of opt-outs. To do so would go beyond what the parties had agreed to and intended. In the criminal case the judge can order restitution to the opt-outs (those in Fund B who have not executed full releases to the defendants) but cannot order "restitution" to the 99½ per cent of the claimants who have executed releases and received satis-

faction from Fund A. They are no longer "aggrieved parties" with "actual damages."

Under no circumstances whatsoever are the damages and restitution to exceed the legal limit of $50,387.40 covered by the Indictment. The Trial Court exceeded the authority conferred by 18 U.S.C. Section 3651 and is to that extent illegal.

The statutory provision supporting Defendants' claim that a *nolo contendere* plea cannot be used as an admission in another court or another case, is to be found in Rule 410 of the *Federal Rules of Evidence (FRE)* which state that "Evidence of a plea of . . . *nolo contendere* . . . to a crime charged or any other crime . . . is not admissible in any civil or criminal action, or proceeding against the person who made the plea. . . ." It is a codification of a common law principle which has existed for hundreds of years, and it is the only remaining, modern difference between the two pleas.

An example of its statement in the case law is to be found in the case of *United States* v. *One Chevrolet Stylemaster Sedan, etc.*, 91 F.Supp. 272, which states:

> "The plea of nolo contendere entered by Ginn cannot be considered in disposing of the issues. It is a confession only for the purpose of a criminal prosecution and does not bind the defendant in a civil action for the same wrong. *United States* v. *Plymouth Coupe*, D.C., 88 F.Supp. 93; *Berlin* v. *United States*, 3 Cir., 14 F.2d 497."

Another such case was *United States* v. *Dorman*, 496 F.2d 438 (1974):

> "Unlike a plea of guilty, a plea of nolo contendere is not admissible against the defendant in a subsequent civil action. Hudson v. United States, 272 U.S. 451, 453 . . . (1926); ABA Standards Relating to Pleas of Guilty 15 (App. Draft 1968); L. Hall, Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 990 (3d Ed., 1969). A defendant, however, does not have an absolute right to plead nolo contendere simply because he wishes to contest his civil liability."



As to the question of which individuals are entitled to receive how much restitution, if any, in addition to the amounts already received by them and their class-action attorneys, the Supreme Court should take into consideration the facts and circumstances that in this case, contrary to most criminal cases where restitution is imposed, millions of dollars were on deposit and readily available. This supports the defendant's continuous contention that, as indicated by the no-contest plea, and by the Revised Settlement Agreement stating that no wrongdoing was acknowledged by the defendants, he was justified in believing promises made by the government and the Judge to the effect that he could rely on the terms of said Settlement Agreement and the releases signed by all the class plaintiffs pursuant thereto.

## III.

## THE USE OF FUND B ($1,000,000) AS ADDITIONAL RESTITUTION, CONTRARY TO THE PROVISIONS OF THE CIVIL SETTLEMENT AGREEMENT, CONSTITUTES THE IMPOSITION OF EXCESSIVE FINES, THEREBY VIOLATING AMENDMENT VIII OF THE CONSTITUTION.

There is also the question of whether the use of Fund B as restitution, contrary to the provisions of the civil agreement is in reality the use of $1,000,000 as additional fines, thereby violating the Constitutional provision in Amendment VIII against excessive fines.

The Order of the Court of Appeals in the instant, criminal case states in relevant part:

> "On January 14, 1974, the appellant Rawlin L. Stovall entered a plea of *nolo contendere* to twenty-five counts of mail fraud, and a plea of guilty to one count of perjury. Stovall also entered a plea of *nolo contendere* on behalf of American Cash Commodities of Missouri, Inc., to nineteen counts of mail fraud.
>
> "Judge Marovitz subsequently sentenced Stovall to two concurrent five year sentences, but suspended the sentences in favor of probation under 18 U.S.C. § 3651. As a condition of probation, the court required Stovall and the corporation to pay restitution to 3,197 victims of the fraud from funds that were then under the jurisdiction of Judge McMillen in a related class action suit against the defendants. On appeal the appellants argue that the trial judge in the criminal proceeding did not have the power to order such restitution as a condition of probation; that the trial judge did not have the power to delay his final order of restitution until the completion of the civil litigation; and that the releases signed by the plaintiffs in the class action suit barred the imposition of restitution in the criminal case."

**Summary and Conclusion**

It is for this Court to decide whether a *nolo contendere* plea can be used as an admission in a related civil case in such a way that the judge in the criminal case can direct the judge in the civil case to abrogate the civil Settlement Agreement, which set up two funds (A and B), Fund A to be used to reimburse class-action members who signed releases stating that the return to them of about $6,500,000 was adequate damages, said releases agreeing that Fund B ($1,000,000) was to be used for other purposes, including restitution to those plaintiffs who opted-out of the



Settlement Agreement and out of Fund A. Said releases also agreed that the plaintiffs were acknowledging that the defendants admitted no wrong doing and that, by accepting restitution from Fund A, the class members were waiving whatever further claims for damages they might have had, if the case had gone to trial.

This Court ought further to decide whether "aggrieved parties" includes all the aforesaid thousands of civil class-action plaintiffs, even though just a few of them were named in the criminal Indictment, and whether "as complete restitution as possible" can mean either more restitution than the amounts listed in the Indictment, or more restitution than the millions of dollars agreed to in the civil Settlement.

Therefore, it is respectfully suggested that this Court ought to issue the Writ of Certiorari in this case.

Respectfully submitted,

GORDON JAMES ARNETT
*Attorney for Petitioners*

LORRAINE WOODS
*Co-counsel*

# APPENDIX

## APPENDIX 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

UNITED STATES OF AMERICA

v.

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC., a corporation

---

No. 73 CR 679

### FINDINGS AND CONCLUSIONS CONCERNING THE IMPOSITION OF RESTITUTION AND FINES

*Background*

The defendants were indicted on September 6, 1973. Counts One through Twenty-five of the indictment charged defendant Rawlin L. Stovall with violations of Title 18, United States Code, Section 1341, the mail fraud statute. Defendant American Cash Commodities of Missouri, Inc. (hereinafter American) was similarly charged in Counts Seven through Fifteen and Counts Seventeen through Twenty-five. The substance of the mail fraud scheme was that defendants fraudulently obtained several million dollars from approximately 3,000 victims by falsely causing the victims to believe defendants were trading commodities on the victims' behalf. Counts Twenty-six and Twenty-seven of the indictment charged defendant Stovall with perjury in violation of Title 18, United States Code, Section 1623.

On January 14, 1974, defendant Stovall pled guilty to Count Twenty-seven, one of the perjury counts. Defendant Stovall individually and on behalf of defendant American offered pleas of nolo contendere to the applicable mail fraud counts. Defendants chose this course of action pursuant to a written plea agreement which was made known to the Court. The plea agreement was executed by Stovall individually and on behalf of his corporation. It was also executed by defense counsel and government counsel.

Defendants were sentenced on February 28, 1974. Defendant Stovall was sentenced to concurrent five year prison sentences on each of the counts of the indictment. Execution of the sentences of imprisonment was suspended and defendant Stovall was placed on probation. American was also placed on probation. Several conditions of probation were imposed as to both defendants. One of the conditions was that restitution be made to the victims of the mail fraud. With the consent of the defendants and their counsel, the Court has delayed final imposition of restitution and fines.

For the reasons stated below, it is now appropriate for the Court to impose final orders of restitution and fines on the defendants. The Court will also correct the sentence imposed in two minor respects.

*Correction of the Sentence Imposed*

In reviewing the Judgment and Order of Probation documents entered in this case, the Court has observed that a portion of each judgment order requires correction pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The Judgment and Order of Probation entered for defendant Stovall states in part:

> IT IS FURTHER ADJUDGED with the consent of defendant, Rawlin L. Stovall, personally, and by his attorney, James Bankvik (sic) that *the imposition of restitution and fines,* as further conditions of probation is deferred until September 20, 1974, or such earlier or later date within the period of probation as the Court may set, depending on the date the balance remaining in the "B" fund is determined in the pending civil class action before Judge Thomas R. McMillen involving both defendants in this indictment. (emphasis added)



Section 3651 of Title 18 permits the entry of an order of restitution "to aggrieved parties for actual damages or loss caused by the offense for which the conviction was had. . . ." One of the counts for which the defendant was convicted, Count Twenty-seven, alleges a violation of the perjury statute, 18 U.S.C. § 1623, and in the Court's view no "actual damages or loss" can be attributed to such a violation in this case.

Accordingly, the Court deems it appropriate to correct the sentence entered by limiting the order of restitution to Counts One through Twenty-five, the mail fraud counts. Those counts clearly involve a determination that "actual damages or loss" was caused by the defendant. Therefore, the language "the imposition of restitution and fines" contained in the original Judgment Order will be corrected to read:

> . . . the imposition of restitution on counts 1 through 25 and fines on counts 1 through 25 and count 27 . . .

The Judgment and Order of Probation for defendant American states in two places that American was charged with using the mails in violation of the mail fraud statute in "counts 7 through 25." The Court observes that defendant American was not charged in count Sixteen of the indictment and accordingly could not have been sentenced for that count. Therefore, the Court will correct the ap-

propriate portions of the Judgment and Order of Probation to read:

> As charged in counts 7 through 15 inclusive and counts 17 through 25 inclusive.

*Restitution*

*Timeliness of the Restitution Order.*

The sentence imposed by this Court on February 28, 1974 [1] set forth that as one of the conditions of probation the defendants make restitution and pay fines as ordered by the Court. The amount of the restitution to be made and the amount of the fines levied was not determined on February 28, 1974, but instead, the Court orally and in writing deferred the imposition of restitution and fines until a date "within the period of probation as the Court may set, depending on the date the balance 'B' fund is determined in the pending civil class action before Judge Thomas R. McMillen. . . ." [2]

The order of restitution and fines and the delay in their imposition arose as a result of the actions of the defendant, defense counsel and the plea agreement. About the time the indictment was returned, various civil fraud suits were filed in this district. Those suits were consolidated into a civil class action suit. An unusual circumstance was brought to the Court's attention. The unusual situation was that at the time of the indictment and the filing of the civil law suits, defendants had not yet dissipated all of the victims' funds. Instead, approximately $6,800,000 had been deposited at the Continental Illinois National Bank and Trust Company of Chicago. By the time this

[1] See the transcript, pages 15-16 and the Judgments and Orders of Probation.

[2] Stovall Judgment and Order of Probation.



Court considered the matter, the fund had earned almost $700,000 in interest. Thus, it became apparent that this Court and Judge McMillen were presented with an unique opportunity to insure that the victims of defendants' nefarious activities would be refunded substantially all of the money which had been fraudulently obtained.

In order to minimize defendant Stovall's chances of receiving a substantial jail sentence, defense counsel entered into plea negotiations with the government and settlement negotiations in the civil litigation. Pursuant to written plea agreements, the defendants were able to obtain recommendations of probation from the government on the condition that they make "as complete restitution as possible" to their victims.[3] Also, a tentative settlement agreement was reached in the civil suit. The settlement agreement contemplated that $6.5 million plus interest was to be set aside for settlement of the class action. The remaining $1 million plus interest was to be placed in a fund designated "Fund B." Fund B was to be available for the payment of various expenses and for payment of restitution and fines if ordered by the Court.[4]

Having taken these actions, defendants were in a position to urge this Court to grant probation on the condition that this Court supervise the money ultimately remaining in Fund B. Thus, at sentencing defense counsel stated that defendants chose to submit the funds

> . . . to the Court and the entire $7,500,000 is on deposit, as the Court knows, at the Continental Bank and is subject to the agreements that we have made and also to the orders of this Court and Judge McMillen. (February 28, 1974, Tr. 3).

[3] February 28, 1974, Tr. 4.

[4] See the letter to the Court dated January 14, 1974 and February 28, 1974, Tr. 5-6.

Defense counsel recognized that it was impossible at the time of sentencing for this Court to determine the amount of money available or to make an intelligent evaluation concerning the distribution of the money. As counsel stated it was his position that this Court would:

> . . . maintain jurisdiction to review the terms of the settlement and also particularly the contents of Fund B under the settlement at the end of the civil litigation and that this Court will determine, will have the power to determine at such time, whether a fine or other conditions should be imposed with respect of that Fund B settlement. . . . (February 28, 1974, Tr. 5-6).

The Court chose to accept counsel's recommendations and imposed the above described sentence.

In order to further insure that at the time the amount of money remaining in Fund B for use in restitution was finally computed, this Court would have the unquestioned ability to order disbursement of Fund B as restitution, the Court specifically obtained defense counsel's consent to such a delay and on two occasions addressed defendant concerning his consent to his counsel's representations and the delay. On both occasions defendant Stovall stated that he understood the proposed actions and consented to them.[5]

From the date of sentencing until the present time, the amount of money available in Fund B for use in the imposition of restitution and fines has not been determined. The delay which occurred was delay attendant to the settlement and subsequent appeal of the civil class action suit and not delay by this Court or by the government. Specifically, the settlement of the civil action suit creating Funds

[5] February 28, 1974, Tr. 6, 16-17. Title 18, United States Code, Section 3651 would have powered the Court to alter the conditions of restitution without the consent of counsel or the defendant.



A and B was not finally approved by Judge McMillen until February 20, 1975, almost a year after the defendant had been sentenced. The settlement was then appealed. Judge McMillen's decision was affirmed in *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976) on January 8, 1976. Since January 8, 1976, Judge McMillen has been faced with numerous motions concerning various claims in the civil litigation. Recently, Judge McMillen disposed of all pending motions in the civil suit.

Throughout the period from February 28, 1974 to the present, this Court has conducted numerous Status Calls in an attempt to insure that at the earliest moment it was feasible to do so a final order of restitution and the entry of fines could be imposed. Recently, the Court has been supplied with an accounting of the receipts and disbursements of the various funds prepared by the Continental Illinois National Bank and Trust Company of Chicago and current through August 31, 1977. In the Court's opinion, the Court is now in a position in which the amount of money available from Fund B for restitution has been determined with sufficient finality for this Court to act. Further, neither counsel for the government nor the defense has provided the Court with any reason to further delay the imposition of restitution and fines.

We note that the period of delay served a useful purpose to the Court. The civil appeal clarified any question concerning the ability of this Court to order restitution from Fund B. As the Court of Appeals stated:

> If in the future, he (this Court) should decide that as a condition of probation defendants must make restitution by paying out the money left in Fund B in the criminal case such an order would not violate the settlement agreement reached in the civil suit. Thus, the most compelling argument of objectors that Stovall still remains a millionaire, despite his nefarious activi-

ties in defrauding depositors, criminal conviction, and the multiple law suits filed against him, is not really valid since Judge Marovitz still retains the power to order restitution to depositors for any funds remaining with Stovall or his company in Fund B. 528 F.2d 100.[6]

*Who is Entitled to Restitution?*

We now turn to the question of who is entitled to restitution from the defendants. Section 3651, Title 18, provides that defendants:

> [m]ay be required to make restitution or reparation to *aggrieved parties* for actual damages or loss caused by the offense for which conviction was had. (emphasis added)

According to the indictment, the victims of defendants' frauds were the:

> approximately 3,000 individuals, partnerships, estates, trusts, associations and corporations who deposited and caused to be deposited money . . . with defendants. (Indictment paragraphs 4A and 5).

At no time throughout these proceedings has the indictment been challenged as insufficient for failure to list the thousands of victims. Likewise, no motion for a bill of particulars was filed requesting a list of the victims. The indictment defining the victims as a class is proper. *Norcott* v. *United States*, 65 F.2d 913 (7th Cir. 1933).

For the purposes of restitution, the government has provided the Court with a list of the names, addresses, the amount of the claims of each of defendants' 3,197 victims. The Court accepts this listing as a complete designation of the victims the government would have proved had there

[6] Later in his opinion Judge Bauer noted:

> As we stated previously, Judge Marovitz still has the power to order restitution from Fund B. 528 F.2d at 114.



been a trial. The government has represented and we accept that this listing is identical with the listing of approved claimants in the civil case.

Accordingly, the Court finds that these 3,197 victims are the aggrieved parties who are entitled to restitution under the statute. In addition, the Court finds that these are the individuals who at the time of the sentencing were contemplated by the government, the defendants and defense counsel and the Court as being eligible to receive restitution.

In a pleading filed February 7, 1977,[7] defendants' successor counsel has challenged the Court's conclusion. Counsel argues that this Court is not impowered to order restitution to all of the 3,197 victims of defendants' fraud, but is instead impowered to order restitution only to the individuals named in relation to the mailings described in counts 7, 8, 10, 19 and 21 of the indictment. In each of those counts the item alleged to have been mailed was an envelope containing a check. These checks totaled $50,-387.40. In other words, according to defendants' theory, the only restitution which is appropriate in this case is a return of the money actually sent through the mail as charged in five of the mailings. Such was not the contemplation of the restitution statute or the mail fraud statute. We are aware of no case which holds that the money fraudulently obtained by the defendants must have been mailed. Indeed the clear statutory language of Title 18, Section 1341, provides only that the mails be used in some way in furtherance of the fraud. Defendants' contention is therefore invalid. However, even assuming the defendants' correctly state the law (which they do not) we find that in this case defendants individually and through their counsel

[7] "Memorandum of law in response to government's position on restitution from Fund B."

have consented by their representations to this Court to make restitution to all of their victims and not just those victims who sent the checks through the mail. Any other construction would make the plea negotiations, the actions of counsel and this Court meaningless.

*The Amount of Restitution.*

Having determined who is entitled to restitution, we now consider the amount of restitution to be ordered. The List of Victims submitted by the government contains claims submitted by the 3,197 victims totalling $8,750,225.88.[8] The government has represented that these are the total claims which would have been proved had there been a trial. As with the designation of the victims, the Court accepts the listing as an accurate designation of the "actual damages or loss" to the victims. The Court also accepts the representation that these claims are identical with the claims approved in the civil case.

The victims have received $6,919,557.92 in settlement of the civil suit and will receive approximately $108,070.26 upon distribution of the amount finally remaining in Fund A. Thus, with Fund A depleted, the gross amount of the "actual damages or loss" has been reduced by $7,027,-628.18. Therefore, a deficiency or unpaid "actual loss" of approximately $1,722,597.70 presently exists. While the deficiency may change slightly as a result of interest income and expenses for administration of Fund A prior to the payout of the $108,070.26, it is virtually certain that the victims will not be made whole as a result of Stovall's action.

Fund B presently contains $1,090,698.93. Fund B is subject to the expenses of administration and to reduction by

[8] All references to monetary amounts are to the Continental Illinois National Bank and Trust Company summary for the period through August 31, 1977.



the payment of fines. The only possibility for its increase is additional interest which may be earned prior to the date of distribution.

At the time of sentencing the prosecution recommended "as complete restitution as possible" be made.[9] The Court stated it would ultimately "order restitution and impose such fines as the Court deems just under the circumstances."[10] Also, at the sentencing, the Court stated its intended use of the money contained in Fund B. The defendants were informed that the Court intended "to use whatever monies are left in that fund (Fund B) to pay these creditors (the victims) as much as I possibly can . . ."[11] Throughout the four year period of this litigation, the Court has found no reason to vary its position from that stated on the date of the sentencing.

Therefore, the Court will order that the defendants reduce the unpaid "actual loss or damages" by making restitution to the victims of the entire amount remaining in Fund B after the payment of all expenses authorized by Judge McMillen, the payment of fines as described below and after payment of a reasonable fee to the Continental Illinois National Bank and Trust Company of Chicago for maintaining and distributing the amount paid as restitution. The restitution is to be made in a manner such that each of the victims ultimately receives an equal proportionate return on his initial deposit with the defendants.[12]

The Court observes that the victims have variously received between 70% and 79% of their money as a result of the distributions previously made. Somewhat detailed

[9] February 28, 1974, Tr. 4.

[10] February 28, 1974, Tr. 16.

[11] February 28, 1974, Tr. 23.

[12] The initial deposits are the "approved claims" in the civil suit.

instructions to the bank are necessary to achieve the above described result. However, since Judge McMillen has quite properly maintained control of the funds pursuant to the civil litigation, this Court deems it appropriate not to attempt to impose any detailed directions to another judge of this Court on the method of payout. Instead, the United States Attorney is instructed to transmit this Court's findings and orders to counsel for the plaintiffs in the civil suit so that he may draft and submit an appropriate payment order for Judge McMillen's consideration.

Payment of the above described pro rata restitution to the victims will not permit any victim to receive more than the original amount of his claim. Each victim will suffer a loss and the unpaid "actual damages or loss" to all of the victims will still be approximately $679,898.77. However, the Court estimates that the recovery for the victims will be approximately 92.2% of the total claims. While there has been a delay in several years in this final payment, the victims have lost the possibility of using their money for other opportunities and part of the money returned to the victims is actually interest income earned by them during the period of the litigation and is subject to federal income tax, the Court observes that the victims are extremely fortunate to have returned to them 92.2% of the money the defendants fraudulently obtained.

*Fines*

The Court has delayed the imposition of fines for the same reasons the final order of restitution was delayed. On March 3, 1977, the Court stated its intention with regard to fines.[13] The Court's intention as stated at that time was that the maximum fine would be imposed on each count against each defendant with the fines to run consecutively

[13] March 3, 1977, Tr. 5-6.



with each other. The Court has delayed the entry of the order on the fines so that a single final order could be entered.

The Court now deems it appropriate to enter an order imposing the above described fines. The fine imposed on defendant Stovall totals $30,000. The fine imposed on defendant American totals $18,000. Throughout this litigation it has been clear that the settlement agreement permits the fines to paid from Settlement Fund B. In the counsel's judgment these fines should now be paid from Fund B and should receive priority of payment over the restitution ordered paid out above. Accordingly the United States Attorney is directed to request plaintiffs' counsel in *Patterson* v. *Stovall* to recommend to Judge McMillen that the fines receive priority in payment over the restitution.

Enter:

/s/ *Abraham L. Marovitz*
Judge, United States District Court

Dated: Oct 12 1977

## APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

January 24, 1979.
(Argued June 8, 1978)

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-2048 vs.

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,

Defendants-Appellants.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73 CR 679

Abraham L. Marovitz, Judge.

### ORDER

On January 14, 1974, the appellant Rawlin L. Stovall entered a plea of *nolo contendere* to twenty-five counts of mail fraud, and a plea of guilty to one count of perjury. Stovall also entered a plea of *nolo contendere* on behalf of American Cash Commodities of Missouri, Inc., to nineteen counts of mail fraud.



Judge Marovitz subsequently sentenced Stovall to two concurrent five year sentences, but suspended the sentences in favor of probation under 18 U.S.C. § 3651. As a condition of probation, the court required Stovall and the corporation to pay restitution to 3,197 victims of the fraud from funds that were then under the jurisdiction of Judge McMillen in a related class action suit against the defendants. On appeal the appellants argue that the trial judge in the criminal proceeding did not have the power to order such restitution as a condition of probation; that the trial judge did not have the power to delay his final order of restitution until the completion of the civil litigation; and that the releases signed by the plaintiffs in the class action suit barred the imposition of restitution in the criminal case.

In *Patterson* v. *Stovall,* 528 F.2d 108 (7th Cir. 1976), this Court affirmed Judge McMillen's approval of a settlement agreement that had been drafted by the parties in the class action suit against Stovall and American Cash Commodities. In reaching this result, we construed the agreement to permit the trial judge in the criminal proceeding to order restitution to the depositors as a condition of the defendant's probation:

> "Since Judge Marovitz' handling of the criminal proceedings greatly influenced the settlement of the civil cases we do not believe that the wording of the agreement should be read to usurp his power to order restitution—an action which he clearly indicated he would take on two separate occasions. If in the future, he should decide that as a condition of probation defendants must make restitution by paying out of money left over in fund 'B' in the criminal case such an order would not violate the settlement agreement reached in the civil suit. Thus the most compelling argument of objectors that Stovall still remains a millionaire, despite his nefarious activities in defrauding depositors, his criminal conviction, and the multiple lawsuits filed against him, is not really valid *since Judge Marovitz*

*still retains the power to order restitution to depositors from funds remaining with Stovall or his company in fund 'B' "*, 528 F.2d at 111 (emphasis added) (citations omitted).

It is thus quite apparent that this Court contemplated (1) that the district court had the power under 18 U.S.C. § 3651 to order a restitution to the depositors as a condition of the defendant's probation; (2) that the court could delay its final order of restitution until the completion of the civil proceedings; and (3) that such a restitution would supplement whatever partial settlement the depositors received in the civil proceedings. We note also in this connection that we see no merit in the appellant's claim that restitution could be made only to individuals named in the indictment, and thus find no grounds for disturbing the lower court's conclusion that 3,197 individuals were "aggrieved parties" within the meaning of 18 U.S.C. § 3651. We therefore affirm the district court's final order of restitution as timely and proper.

The appellant also claims that his plea of *nolo contendere* was entered with the understanding that, as a result of the plea bargain, he would receive one million dollars from funds under the jurisdiction of the trial judge in the civil case. Furthermore, he argues that his plea was entered without the trial judge apprising himself of the promises made by the government to induce the plea. These claims warrant little discussion, for it is quite apparent from the records of the plea on January 14, 1974, and the sentencing on February 28, 1974, that the government recommended the "fullest possible restitution" as a condition of probation, and that both the defendant and his attorney understood the government's position.

We have examined the appellant's other arguments and find them to be without merit. The judgment of the district court is therefore

AFFIRMED.



## APPENDIX 3

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

March 1, 1979

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

UNITED STATES OF AMERICA

Plaintiff-Appellee,

No. 77-2048 vs.

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,

Defendants-Appellants.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellants Rawlin L. Stovall and American Cash Commodities of Missouri, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

## APPENDIX 4

ADDENDUM "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY and JEANETTE KEPPY, et al.,

*Plaintiffs,*

vs.

ROY STOVALL, et al.,

*Defendants.*

CIVIL ACTION NO. 73 C 2280

And Consolidated Cases 73 C 2382 and 73 C 2720

### REVISED SETTLEMENT AGREEMENT

This settlement agreement as revised pursuant to Order of Court dated July 12, 1974, is submitted for the Court's consideration of its reasonableness and adequacy pursuant to Rule 23, F.R.C.P., and the procedures set forth in the Manual for Complex and Multidistrict Litigation, as revised. The terms and conditions contained herein constitute the settlement agreement between counsel for the undersigned defendants and counsel for all plaintiffs in these consolidated cases. This settlement agreement would resolve in a full and final settlement of all pending consolidated claims against the undersigned defendants brought on behalf of the plaintiff class.



### TERMS OF AGREEMENT

1. The general purpose of this agreement is to effect a full and final settlement and release of all consolidated claims against the undersigned defendants, brought by or on behalf of all plaintiffs and arising out of, mentioned in, related to, or based in whole or in part on any of the facts or matters alleged in the actions as heretofore filed, or which may hereafter arise between all named plaintiffs, and defendants Rawlin L. Stovall, Stovall & Stovall, Inc., American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth. The consolidated cases are:

| *Case Title* | *Case Number* |
|---|---|
| John Patterson vs. Roy Stovall, et al. | 73 C 2280 |
| Richard Dobson, et al., vs. Roy Stovall, et al. | 73 C 2382 |
| R. Glenn Brackett vs. Roy Stovall, et al. | 73 C 2720 |
| Arnold Mark, et al. vs. Roy Stovall, et al. (Circuit Court of Cook County) | 73 CH 5282 |

For purposes of carrying out the terms of this agreement, all counsel of record for plaintiffs in the consolidated class action shall constitute a Committee of Counsel for the consolidated class actions. The term "plaintiffs" shall include all depositors of funds with any named defendants, or depositors of funds with any unnamed principals, salesmen, brokers, independent contractors, dealers or agents, all for the purpose of investing in "cash commodities for deferred delivery" with any named defendants.

2. The undersigned defendants state that by this agreement they do not admit that they, or any of them, or any of their predecessors or present or former agents, officers, directors, or employees committed or participated in any violations of any laws, or that they, or any of them, are liable to the plaintiffs, or anyone, for damages relating to

the investments in cash commodities for deferred delivery. However, in order to avoid lengthy, costly and time-consuming litigation and in order to avoid the risks of litigation and to obtain total and final settlement of the claims alleged against them, the undersigned enter into this agreement subject to all the terms and conditions contained herein.

3(a). As a result of efforts in the *Patterson* case, and of negotiations between counsel for all parties in the consolidated cases, there now exists the following funds of money, (i) on deposit in checking accounts, interest-bearing accounts, and securities at the Continental Illinois National Bank in the approximate amount of $7,800,000.00 and, (ii) except for funds released to the defendants by prior order of court, the defendants represent that there are no other funds which relate to the claims asserted in this cause and/or to the claims of any depositor.

All funds, increments, and interest accruing thereon, shall hereafter be referred to as the "Settlement Fund", and shall be divided into two parts upon the entry of an appropriate order by the District Court approving the settlement and designating the two funds. "Settlement Fund A" shall be in the approximate sum of $6,500,000.00 and "Settlement Fund B" shall be in the initial sum of $1,000,000.00. Upon execution hereof, and approval by the District Court, all monies, funds, securities and items shall be converted to high yield, secure investment securities which shall be readily converted to cash and not subject to market fluctuations, all subject to court approval.

3(b). "Settlement Fund A" shall consist of all of the aforesaid funds and all interest accruing thereon, less $1,000,000.00 allocated to "Settlement Fund B". Upon its establishment by court order, "Settlement Fund A"



shall be available to all plaintiff-depositors who shall participate in this settlement by filing acceptable claims for refund (which shall be limited to the amount of monies deposited, exclusive of interest, profits and other increments) with the Court, and for claimants who do not file, but may be equitably entitled to a refund; "Settlement Fund A" shall be used for the pro rata distribution of all such claims, subject only to actual costs of administering said funds which are necessarily incurred by consolidated class counsel, costs in mailing distribution after notice, and reasonable costs and attorneys' fees to consolidated class counsel.

Anything contained herein to the contrary notwithstanding, no plaintiff participating in "Settlement Fund A" shall receive an amount in excess of 100% of his deposit, less court awarded fees and costs. If any funds are remaining after payment of all plaintiffs' claims, those funds shall "pour over" and be added to "Settlement Fund B".

Claimants to "Settlement Fund A" shall be only those persons who have invested monies with any plaintiff or any defendant for the purpose of investing in cash commodities for deferred delivery with named defendants and who have not received a full return of their principal investment, except for those persons who have previously settled or released their claims.

3(c). "Settlement Fund B" shall initially consist of $1,000,000.00 plus whatever sums "pour over" under Paragraph 3 (b). Interest accruing on said $1,000,000.00, after court approval establishing "Settlement Fund B", shall inure to that Fund. All money in "Settlement Fund B" shall be set aside and held subject to further order of Court, and shall be held subject to the disposition of such litigation as may ensue on behalf of "opt out" claimants

or others, including defendants' attorney fees and costs. It shall also be subject to claims of the Internal Revenue Service. After payment or denial by court order of all of those claims, and the expiration of 30 days thereafter, all funds remaining, if any, shall belong to "American", but in no event shall this occur less than one year after approval of this settlement by the District Court, unless extended by Court order.

Any and all depositors' funds hereafter located and not specifically mentioned herein shall be included in "Settlement Fund A".

3 (d). Defendants "Stovall" and "American" represent as part of this Settlement that the net total sums paid by all plaintiffs to "Stovall" and "American" (after withdrawals) is no greater than $8,900,000.00; in the event the deposits of all plaintiff-class exceed $8,900,000.00, the defendants agree that the Court shall reduce "Settlement Fund B" by such amount and include said Funds in "Settlement Fund A".

4. All attorneys' fees to be awarded for plaintiffs' counsel in the consolidated cases shall be awarded and paid from "Settlement Fund A" created by this agreement, and all other costs and expenses of the administration of the settlement fund and notice to class members shall be paid from the "Settlement Fund A".

5. Following disposition of this agreement by the Court, the consolidated plaintiffs shall, subject to the court retaining jurisdiction to enforce the terms and conditions of this agreement, move to dismiss*, with prejudice, all claims

* and shall concurrently dismiss the case of *Arnold Mark, et al.* v. *Roy Stovall, et al.*, 73 CH 5282, Circuit Court of Cook County, Illinois.



heretofore described against the undersigned defendants, their subsidiaries, agents, officers, directors, and employees, except those persons who have previously exercised their option to be excluded from the plaintiff class as determined by the Court in this litigation.

6. This agreement shall be binding on the heirs, executors, administrators, successors, and assigns of the undersigned defendants and the Court shall retain continuing jurisdiction to enforce the terms and conditions of this settlement agreement.

7. This agreement represents the entire and sole agreement negotiated and agreed to between the consolidated plaintiffs and the undersigned defendants. The distribution of the proceeds of the Settlement Fund shall be according to such plan as the plaintiffs may propose and the Court shall approve. The undersigned agree that determination of an equitable plan of distribution is feasible only after the number and nature of the claimants are known.

It is agreed that all distributions shall be made by check or draft, the acceptance of which shall constitute a full release of all claims which the depositor-plaintiff may have against any defendant.

8. Upon the final approval of a plan of distribution, such plan shall be incorporated as part of this agreement and may be appended hereto as Schedule A.

9. The settlement and compromise of all actions will be submitted to the Court for its approval under Rule 23 (e) of the Federal Rules of Civil Procedure. If so approved, all pending actions will be dismissed with prejudice as to

all defendants. The Court will, however, retain jurisdiction for purposes of administering this Settlement.

Attorneys for Plaintiffs; Defendants and Attorneys

/s/ Philip S. Wolin
/s/ Arthur Mintz
/s/ Edward A. Berman
/s/ Michael A. Zelmar
/s/ Jeffrey Schulman
/s/ Herbert Rothbart
/s/ Max Humphries

/s/ Rawlin L. Stovall
RAWLIN A. STOVALL, Defendant

AMERICAN CASH COMMODITIES OF MISSOURI, INC., Defendant
By /s/ Rawlin L. Stovall
/s/ James Brandvik
/s/ Jacobson & Brandvik

FRANK L. HACKBARTH
By /s/ Wallace, Shelton, Kleinman & Kalcheim
/s/ Coleman Ginsparg

Supreme Court, U. S.
FILED
JAN 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1494

# In the Supreme Court of the United States

OCTOBER TERM, 1978

RAWLIN L. STOVALL AND AMERICAN CASH COMMODITIES OF MISSOURI, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 14) is reported at 590 F. 2d 338.

### JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on March 1, 1979. The petition for a writ of certiorari was filed on March 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the district court abused its discretion by ordering restitution pursuant to 18 U.S.C. 3651.

## STATUTE INVOLVED

18 U.S.C. 3651 provides in pertinent part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * * * *
>
> While on probation and among the conditions thereof, the defendant—
>
> > May be required to pay a fine in one or several sums; and
> >
> > May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *.

## STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner Stovall was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341, and on one count of making a false statement to a grand jury, in violation of 18 U.S.C. 1623. Petitioner American Cash Commodities (American) was convicted on 19 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Stovall was sentenced to concurrent five-year terms of imprisonment on each count. Execution of the sentence was suspended, however, and Stovall was



placed on five years' probation subject to the condition that he make restitution to the victims of the fraud. He was also fined $30,000. Petitioner American was also placed on five years' probation subject to the same condition, and was fined $18,000 (Pet. App. 2, 12, 13; Sentencing Tr. 15, 16).

1. On September 6, 1973, petitioner Stovall and petitioner American (Stovall's wholly-owned corporation) were indicted for mail fraud. The indictment alleged that petitioners defrauded more than 3,000 investors of approximately $6,000,000 by misrepresenting that they were trading commodities on the victims' behalf.[1] Petitioners allegedly received funds from clients for commodities trading and sent them false and misleading periodic statements summarizing transactions and profits earned for their accounts.

Contemporaneously with the filing of the indictment, several of the defrauded investors filed civil actions in the United States District Court for the Northern District of Illinois. Those actions were consolidated before Judge Thomas R. McMillen as a single class

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[1] The charging count of the indictment (Count 1, para. 5) alleged that petitioners

> devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from [their] clients by means of false and fraudulent pretenses, representations and promises * * *.

This allegation was incorporated by reference in each subsequent count. The indictment defined the term "client" as the "approximately 3000 individuals, partnerships, estates, trusts associations and corporations who deposited and caused to be deposited money totaling approximately $6 million with defendants RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC." (Count 1, para. 4(a)).

action (Pet. App. 15; *Patterson* v. *Stovall*, 528 F. 2d 108, 110 (7th Cir. 1966)). At the time the civil suits were filed, petitioners had $6,800,000 of the investors' funds on deposit at the Continental Bank of Chicago. The bank was joined as a defendant, and during the litigation the fund remained on deposit in an interest-bearing account (528 F. 2d at 110). On February 6, 1974, petitioners and a number of the plaintiffs presented a proposed settlement agreement to Judge McMillen for his approval. In summary, the agreement provided that the fund on deposit at the bank would be divided into two smaller funds. The first, "Fund A," would consist of all the money on deposit at the bank except for $1,000,000. Fund A would be distributed on a pro rata basis to all investors who desired to participate in the out-of-court settlement. "Fund B," which would consist of the remaining $1,000,000, would be used to compensate investors who chose to litigate their claims, and to pay assorted other claims, including claims of non-investor creditors, tax obligations, attorneys' fees, and any fines that might be imposed in the criminal action. The agreement further provided that any amount remaining in Fund B after those disbursements would revert to petitioner American. On February 20, 1975, Judge McMillen overruled the objections of several claimants to this proposal. He then approved the settlement agreement and authorized distribution of the funds in accordance with it (528 F. 2d at 100-111 & n.2).[2]

2. Prior to Judge McMillen's approval of the proposed settlement agreement, petitioners negotiated a

[2]The court of appeals held that the judge in the civil action did not abuse his discretion in approving the settlement agreement. *Patterson* v. *Stovall*, *supra*, 528 F. 2d at 112-115.



plea agreement with the government. It provided in substance that petitioner Stovall would plead guilty to the false statement count and nolo contendere to the mail fraud counts, and that American would similarly enter nolo contendere pleas to the mail fraud counts under which it was indicted. Additionally, petitioners agreed "[to make] the fullest possible restitution of all monies received * * * and [of] all interest earned * * *" (Jan. 14, 1974 Tr. 17). In return, the government agreed not to recommend incarceration for petitioner Stovall (*ibid.*).

Petitioners entered the pleas contemplated by the plea agreement before Judge Abraham L. Marovitz. During that proceeding Judge Marovitz was apprised of the terms of the proposed civil settlement agreement by attorneys for the investors (Jan. 14, 1974 Tr. 3, 4, 5). He also reviewed the terms of the plea agreement and reminded petitioner Stovall that "the government's position is that the fullest possible restitution should be made to all those people" (*id.* at 7-8). Judge Marovitz then continued sentencing for a month pending consummation of the proposed settlement agreement in the civil action before Judge McMillen (*id.* at 19).

During the sentencing proceeding conducted on February 28, 1974, Judge Marovitz reviewed with the parties the terms of the civil settlement agreement and remarked that there was a good chance that Fund B would be left substantially intact due to the limited number of claimants participating in the litigation (Sentencing Tr. 8-9). He expressed his intent "to use whatever monies are left in that fund to pay these creditors as much as I possibly can * * *" (Sentencing Tr. 23). Petitioners' attorney also stated (*id.* at 5-6):

> I have explained to Mr. Stovall, following our discussions, that this Court will maintain jurisdiction to review the terms of the settlement and also

> particularly the contents of Fund B under the settlement at the end of the civil litigation and that this Court will determine * * * whether a fine or other conditions should be imposed with respect to that Fund B settlement as to Mr. Stovall and he understands it, your Honor.

When questioned by the court, petitioner consented to such action and agreed with the substance of his counsel's statement (*id.* at 6). The trial judge then imposed sentence but, after obtaining petitioners' concurrence, he suspended imposition of fines and restitution until final determination of the amount remaining available in Fund B after payment of all judgments and other claims (*id.* at 10, 14, 15-16).

The civil litigation before Judge McMillen was not concluded until September 1977. Subsequently, Judge Marovitz entered his final order determining the nature and extent of restitution. Judge Marovitz found that despite the disbursements from Fund A, the defrauded investors still had suffered a collective loss of $1,722,597. Because Fund B still contained $1,090,698 at the conclusion of the civil litigation, Judge Marovitz directed that the

> defendants reduce the unpaid "actual loss or damages" by making restitution to the victims of the entire amount remaining in Fund B after the payment of all expenses * * * fines * * * and * * * a reasonable fee to the * * * [banks]. The restitution is to be made in a manner such that each of the victims receives an equal proportionate return on his initial deposit with the defendants. [Pet. App. 10, 11; footnote omitted.]

3. The court of appeals held that Judge Marovitz had acted within his authority under 18 U.S.C. 3651 in ordering restitution to the victims of the fraud as a condition of probation. The court noted that in affirming the approval of the civil settlement agreement, it had specifically held that Judge Marovitz "'still retains the power to order restitution to depositors from funds remaining with Stovall or his company in Fund "B"'" (Pet. App. 16, quoting from 528 F. 2d at 111). The court found no ground for upsetting the district court's determination that all 3,197 investors were "aggrieved parties" within the meaning of 18 U.S.C. 3651, to whom restitution could appropriately be ordered in the criminal case.



## ARGUMENT

1. Petitioners contend (Pet. 19) that it was improper for the trial judge to order restitution to each of the 3,197 victims of their fraudulent scheme, and that he should have limited the restitution order to defrauded investors specifically named in the indictment.

However, Section 3651 authorizes the trial court to impose, as a condition of probation, the requirement that the defendant "make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." The mail fraud counts, to which petitioners entered nolo pleas, each alleged that there were more than 3,000 victims of the scheme, and that those victims were collectively defrauded of more than $6,000,000. Prior to the entry of the restitution order, the government supplied the court with the names and addresses of the victims, and the court accepted the government's uncontroverted representation that the list was identical with the list of approved claimants participating in the civil case (Pet. App. 8-9). Under these circumstances, it was entirely proper for the court to

rule (Pet. App. 9) that the actual victims of the fraudulent scheme charged in the indictment were "aggrieved parties" entitled to restitution under the statute. See generally *United States* v. *Follette*, 32 F. Supp. 953, 955 (E.D. Pa. 1940); see also *United States* v. *Boswell*, 565 F. 2d 1338, 1342 (5th Cir. 1978), cert. denied, No. 77-1466 (Oct. 2, 1978).

The fact that the individual victims were not specifically named in the indictment or alleged to have mailed checks to petitioner is of no moment. The identities of individual mail fraud victims are not essential to a mail fraud indictment; the indictment need only identify a victimized class. *Butler* v. *United States*, 317 F. 2d 249, 256, & n.9 (8th Cir.), cert. denied, 375 U.S. 836 (1963). See also *United States* v. *Unger*, 295 F. 2d 889, 891 (7th Cir. 1961). Moreover, the mail fraud statute does not require that all of the funds involved in the fraudulent scheme be sent through the mails. It is only necessary that the mails be used in furtherance of the fraud. See, *e.g.*, *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

The authorities on which petitioners rely (Pet. 9, 11) are not pertinent here. In *Karrell* v. *United States*, 181 F. 2d 981 (9th Cir. 1950), the court held that it was improper to condition probation upon restitution for offenses of which the defendant was acquitted. In *United States* v. *Buechler*, 557 F. 2d 1002, 1007-1008 (3d Cir. 1977), and *United States* v. *Follette*, *supra*, the courts ruled that restitution could not be ordered in an amount exceeding that involved in the offenses of which the defendant was convicted. And in *United* States v. *Clovis Retail Liquour Dealers Trade Association*, 540 F. 2d 1389 (10th Cir. 1976), the court held that restitution could not be ordered to persons



who were not "aggrieved parties * * * by the offense for which the conviction was had." Here, by contrast, petitioners were convicted of defrauding the persons to whom they were ordered to pay restitution, and the amount of the restitution was based on the loss suffered by the victims as a result of that fraud.[3] In any event, as the trial judge stated, "in this case defendants individually and through their counsel have consented by their representations to this Court to make restitution to all their victims and not just those victims who sent their checks through the mail" (Pet. App. 9-10). If this condition of probation were not enforced, the plea agreement that resulted in a recommendation that petitioner Stovall not be incarcerated would be substantially undermined.

2. Petitioners also contend (Pet. 13, 17, 19) that the restitution order contravenes the terms of the civil settlement agreement because the order requires

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[3]Petitioners' reliance (Pet. 12) on *United States* v. *Hoffman*, 415 F. 2d 14 (7th Cir. 1969), is equally misplaced. In *Hoffman*, the restitution order was remanded for revision because "the 'aggrieved parties' portion of §3651 is not identified * * *, the 'actual damages or loss caused' is not fixed nor is the sum definite or yet determined with exactitude (*id.* at 22)." Here, by contrast, the identities of all the aggrieved parties, as well as the individual and cumulative loss, were fully established prior to entry of the restitution order. The only unknown factor that delayed entry of the order was the amount remaining in Fund B after completion of the civil litigation that was available for pro rata distribution to the victims. See *United States* v. *Landay*, 513 F. 2d 306, 308 (5th Cir. 1975).

Petitioners also claim (Pet. 15) that the delay between entry of the plea and the order directing restitution constituted a denial of "equal protection of Section 3651." Yet petitioners fail to suggest any prejudice resulting from this delay and, more importantly, they assented to exactly such a delay upon questioning by the trial judge (Sentencing Tr. 16).

payments from Fund B to claimants who previously accepted partial settlement from Fund A and who agreed to release petitioners from further civil claims. Thus, petitioners argue, the restitution order "go[es] beyond what the parties had agreed to and intended" (Pet. 19).

Initially, we note that this claim is factually inaccurate. As the court of appeals recognized in *Patterson* v. *Stovall*, *supra*, prior to the approval of the civil settlement agreement, Judge Marovitz made it clear to petitioners that the fullest possible restitution was contemplated by the government as a condition to its recommending probation (Jan. 14, 1974 Tr. 7-8).[4] Thereafter, at the sentencing hearing on February 28, 1974, Judge Marovitz stated that it was his intention to look to Fund B as the source of restitution (Sentencing Tr. 9-10, 23). Stovall acquiesced in the exercise of the court's restitution power with respect to any residuum in the fund following the payment of the civil judgments (Sentencing Tr. 6). Thus, prior to approval of the settlement agreement, petitioner Stovall fully understood that Fund B would be used, to whatever extent necessary, to make the defrauded investors whole. Consequently, the restitution order did not contravene the expectations of the parties to that agreement. *Patterson* v. *Stovall*, *supra*, 528 F. 2d at 111.[5]

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[4]Hence there is no substance to petitioners' claim (Pet. 18) that the trial judge was unaware of the scope of the pretrial negotiations. Indeed, his statements show that he had been apprised of the scope of the agreement during pretrial conferences (Tr. 5-8). A copy of the written agreement was furnished to Judge Marovitz at the guilty plea hearings, and he reviewed its terms with petitioner Stovall at that time (Sentencing Tr. 16-17, Gov't Exh. 2).

[5]Petitioners certainly had no reasonable expectation that Fund B would be repaid to them. Fund B was created for the very purpose of providing restitution. The money was held under order of the court to pay defrauded investors who opted out of the class action litigation, to pay the IRS certain outstanding tax liabilities, and to make restitution to "others" (Pet. App. 21-22). Moreover, the notice sent to the settling class members stated that Fund B would be available to satisfy "any fines imposed against defendants in the criminal proceeding before Judge Abraham L. Marovitz" (Pet. 6).



In any event, the restitution order is not limited by the terms of the civil settlement; the terms of the restitution order are subject only to the trial judge's independent sentencing discretion. As the court held in an analogous context in *Gross* v. *United States* 228 F. 2d 612, 615 (8th Cir. 1956):

> [T]he determination by the State Court that [defendants] * * * were not entitled to civil judgment against Gross personally is no help to him in the criminal proceedings in the federal court. The judgment of the State Court in the civil action did not, and could not, absolve Gross of criminal liability for the offense of which he was convicted or deprive the federal court of its power to deal with that offense according to federal law. Having been convicted, it was for the federal court to impose sentence and to determine the terms and conditions of probation if probation was granted. The court, by Section 3651 of Title 18 U.S.C.A., could require Gross to "make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which the conviction was had."

certain claims to civil damages as a condition of the civil settlement does not alter their status as "aggrieved parties" victimized by a criminal scheme within the meaning of the probation statute.[6]

3. Petitioners' final contention (Pet. 21-22) is that the restitution order constitutes an excessive fine in violation of Eighth Amendment. Petitioners make no legal argument to support this claim and it is clear that the restitution order in this case was a particularly appropriate punishment for the offense committed. The effect of the order is to divest petitioners of funds that are directly traceable to their fraudulent scheme and to restore them, insofar as possible, to the victims.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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PHILIP B. HEYMANN
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*Attorney*

MAY 1979

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[6]Petitioners advance the related argument (Pet. 20-21) that the restitution order violates Fed. R. Evid. 410, which excludes evidence of nolo contendere pleas in civil proceedings. That rule is inapplicable here because the restitution order was not the result of the use of a nolo plea in a civil action. The restitution order was an integral part of the sentence imposed following petitioners' nolo plea in the same criminal proceeding.

DOJ-1979-05